Mega Education Systems Sdn Bhd & Anor v Ozone Glass Design Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING PETITION NO D-26NCC-1 OF 2010
MOHAMAD ARIFF J
18 MARCH 2011

Companies and Corporations — Oppression — Conduct amounting to oppression — Allegation of impropriate conduct of second and third respondents — Expropriation of funds and undisclosed benefits — Failure to exercise powers and management bona fide — Whether oppressive conduct — Whether in disregard of interests of other shareholders — Whether established — Whether justifiable ground to file winding up petition — Petitioners to institute one suit under s 181, and include winding up of company as alternative ground — Companies Act 1965 ss 181 & 218(1)(f)

The applicant herein filed two petitions with respect to the same subject matter namely, under ss 181 and 218(1)(f) of the Companies Act 1965. The relief claimed, as far as s 218 was concerned, was for an order to wind up the first respondent, Ozone Glass Design Sdn Bhd ('Ozone'). In relation to the claim under s 181, the alleged conduct of the second and third respondents was regarded as oppressive and/or in disregard of and/or unfairly discriminated against the petitioners and/or was allegedly otherwise prejudicial to the petitioners' interests as members of Ozone. It was also alleged that the affairs of Ozone and the powers of the directors had been conducted in a manner likely to defeat the legitimate expectations of its shareholders. Further, it was alleged that all the powers of the directors, namely the second and third respondents, were vested in these respondents as fiduciaries and the powers and management had not been exercised bona fide in the interest of the first respondent as a whole to achieve a proper purpose, but instead the powers had been used for collateral purposes. The petitioners alleged, inter alia, that there had been an expropriation of funds and undisclosed benefits received by Ted Chan and his wife. The charging of personal expenses to the company and concealing the same from the other shareholders, it was argued, amounted to conduct which was oppressive and in disregard of the interests of the other shareholders. The respondents however, denied the allegation of lack of transparency.

Held, dismissing the petitioners' suit with costs:

(1) Ted Chan, the second respondent, was the Managing Director of Ozone, and as such must be entitled to draw some payment for his efforts, and the evidence disclosed that there was an employment contract between

him and Ozone, which was most probably known or made known to Hj Su'ut, the second petitioner, at the very least. It came out very clearly through the evidence that Ted Chan was in fact drawing much less than what he was entitled to under the agreement. He had chosen not to draw his contractual salary, but instead had drawn disbursements to cover his and his wife's living expenses. What Ted Chan had drawn from the company to cover these expenses must be balanced against the capital and the loans that he had injected into Ozone. The petitioners had merely invested in the company in the situation where this investment was a pure commercial decision. This was not the case where one can impute a quasi-partnership relationship (see para 25).

(2) True enough Ozone was presently making losses, but the evidence presented showed these losses were incurred because the company had further invested in expensive machinery and moved its factory to a more expensive location and incurred higher rental and manpower costs, because of assurances made by another director ('Dato' Aziz') that Ozone was in a position to obtain lucrative Putrajaya contracts. Dato' Aziz was brought into the company not by Ted Chan, but was recommended in part by Dato' Hj Bujang and Hj Su'ut themselves. The evidence also disclosed that the losses cannot really be regarded as 'chronic' losses (see para 25).

(3) Ted Chan had worked extremely hard, despite his ill health, to procure lucrative contracts for the company. He had marketed the company in obtaining the contracts single-handedly with his wife without any help from the petitioners, who had voluntarily left the management of the company in the hands of Ted Chan and his wife when the petitioners resigned from the board. This, with respect, is not the case of involuntary exclusion from the management. The evidence disclosed further that the petitioners resigned from the board at a time when the proposed lucrative acquisition of Malaysian Sheet Glass did not materialise (see para 25).

(4) When hard-nosed businessmen enter into an investment opportunity, they have to expect a risk of loss as well as an expectancy of profits. The court cannot be expected to provide an exit mechanism for them when an investment turns sour. As is sometimes said, the court cannot be expected to conduct a judicial review of business judgements. The jurisdiction conferred under ss 181 and 218 has to be exercised within their narrow compass against the precise evidence and circumstances presented before the court. As in here, there was no breach of any equitable bargain, no commercial unfairness, no oppression, no unfair disregard of interests and generally no unfair prejudice being caused to the petitioners (see para 25).

[Bahasa Malaysia summary

Pemohon memfailkan dua petisyen berkenaan perkara yang sama iaitu, di bawah ss 181 dan 218(1)(f) Akta Syarikat 1965. Relief yang dituntut, di mana berkenaan s 218 adalah bagi mendapatkan perintah untuk penggulungan responden pertama, Ozone Glass Design Sdn Bhd ('Ozone'). Berhubung dengan tuntutan di bawah s 181, tingkah laku responden kedua dan ketiga adalah dianggap sebagai menindas dan/atau mengabaikan dan/atau mendiskriminasi pempetisyen secara tidak adil dan/atau didakwa selainnya memudaratkan kepentingan pempetisyen sebagai ahli Ozone. Turut didakwa bahawa hal ehwal Ozone dan kuasa-kuasa pengarah telah dijalankan dengan cara yang mungkin mengalahkan jangkaan sah pemegang sahamnya. Tambahan pula, didakwa bahawa kesemua kuasa pengarah-pengarah, iaitu responden kedua dan ketiga, terletak pada responden-responden tersebut sebagai fidusiari dan kuasa-kuasa dan pihak pengurusan telah tidak dilaksanakan secara *bona fide* dalam kepentingan responden pertama secara keseluruhannya bagi mencapai tujuan yang sesuai, tetapi sebaliknya kuasa-kuasa telah digunakan untuk tujuan kolateral. Pempetisyen-pempetisyen mendakwa, antara lain, bahawa telah berlaku rampasan dana dan faedah tidak didedahkan yang diterima oleh Ted Chan dan isterinya. Caj perbelanjaan peribadi kepada syarikat tersebut dan menyembunyikannya daripada para pemegang saham lain, dihujahkan, terjumlah kepada tingkah laku yang menindas dan tanpa mengira kepentingan para pemegang saham lain. Responden-responden walau bagaimanapun, menafikan dakwaan kurang ketelusan.

Diputuskan, menolak guaman pempetisyen-pempetisyen dengan kos:

(1) Ted Chan, responden kedua, adalah Pengarah Urusan Ozone, dan oleh itu semestinya berhak membuat beberapa bayaran atas usahanya, dan bukti menunjukkan bahawa terdapat kontrak pekerjaan antaranya dan Ozone, yang mungkin diberitahu atau disampaikan kepada Hj Su'ut, pempetisyen kedua, sekurang-kurangnya. Ia dikemukakan dengan jelas melalui bukti-bukti bahawa Ted Chan sebenarnya mengeluarkan lebih kurang daripada apa yang berhak didapatinya di bawah perjanjian tersebut. Dia telah memilih untuk tidak mengeluarkan gaji kontrak, tetapi sebaliknya telah membuat pengeluaran untuk menampung perbelanjaan hidupnya dan isterinya. Apa yang dikeluarkan oleh Ted Chan daripada syarikat untuk menampung perbelanjaan-perbelanjaan ini mesti diseimbangkan dengan modal dan pinjaman yang telah dia masukkan ke dalam Ozone. Pempetisyen hanya melabur dalam syarikat tersebut dalam keadaan di mana pelaburan ini adalah keputusan komersil semata-mata. Ini bukan kes di mana seseorang boleh mengadakan hubungan kuasi-perkongsian (lihat perenggan 25).

(2) Adalah benar bahawa pada masa ini Ozone membuat kerugian, tetapi bukti yang dikemukakan menunjukkan kerugian yang ditanggung

kerana syarikat itu telah terus melabur dalam jentera mahal dan berpindah kilang ke lokasi yang lebih mahal dan sewa yang ditanggung dan kos tenaga kerja lebih tinggi, kerana jaminan yang dibuat oleh pengarah lain ('Dato' Aziz') bahawa Ozone berada dalam keadaan mendapatkan kontrak-kontrak lumayan Putrajaya. Dato' Aziz telah dibawa masuk ke dalam syarikat bukan oleh Ted Chan, tetapi disyorkan sebahagiannya oleh Dato' Hj Bujang dan Haji Su'ut sendiri. Bukti juga menunjukkan bahawa kerugian tidak boleh dianggap sebagai kerugian 'kronik' (lihat perenggan 25).

(3) Ted Chan telah bekerja keras, walaupun keuzuran, untuk mendapatkan kontrak-kontrak lumayan bagi syarikat tersebut. Dia telah mempromosikan syarikat tersebut dalam mendapatkan kontrak-kontrak tersebut secara bersendirian dengan isterinya tanpa sebarang bantuan daripada pempetisyen-pempetisyen, yang telah secara sukarela meninggalkan pengurusan syarikat itu di tangan Ted Chan dan isterinya apabila pempetisyen-pempetisyen meletak jawatan dari lembaga. Ini, dengan segala hormat, bukanlah kes pengecualian tanpa sukarela oleh pihak pengurusan. Bukti-bukti seterusnya menunjukkan bahawa pempetisyen-pempetisyen yang meletak jawatan daripada lembaga pada bila-bila masa apabila cadangan pengambilalihan itu menguntungkan *Malaysian Sheet Glass* tidak menjadi (lihat perenggan 25).

(4) Apabila seorang ahli perniagaan dengan tegas memasuki ke dalam peluang pelaburan, mereka telah menjangkakan risiko kerugian serta jangkaan keuntungan. Mahkamah tidak boleh diharapkan untuk menyediakan satu mekanisme jalan keluar bagi mereka apabila pelaburan bertukar menjadi rugi. Seperti yang kadangkala diperkatakan, mahkamah tidak boleh diharapkan untuk menjalankan semakan kehakiman bagi penghakiman perniagaan. Bidang kuasa yang diberikan di bawah ss 181 dan 218 mestilah dilaksanakan secara terhad terhadap bukti-bukti yang tepat dan hal keadaan yang dikemukakan di hadapan mahkamah. Seperti dalam kes ini, tiada pelanggaran perjanjian ekuiti, tiada ketidakadilan perdagangan, tiada penindasan, tiada pengabaian kepentingan yang tidak adil dan secara amnya tiada penjejasan tidak adil terhadap pempetisyen (lihat perenggan 25).]

Notes

For a case on conduct amounting to oppression, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 645.

Cases referred to

Baumbler (UK) Ltd; Gerrard v Koby, Re [2005] 1 BCLC 92 (refd)
Ebrahimi v Westbourne Galleries Ltd [1973] AC 360, HL (refd)
Elgindata Ltd, Re [1991] BCLC 959 (refd)
Grace v Biagioli, Titanium Electoral Products Ltd, Re [2006] BCC 85, CA (refd)

Guidezone Ltd Re [2000] 2 BCLC 321 (refd)
Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung, Re [1978] 2 MLJ 227, PC (refd)
O'Neill and another v Phillips and others, Re a company (No 00709 0f 1992) [1999] 2 BCLC 1, HL (refd)
Owen Sim Lian Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113, FC (refd)
Pan-Pacific Construction Holdings Sdn Bhd v Ngui-Kee Corporation (M) & Anor [2010] 6 CLJ 721, FC (refd)
Saul D Harrison & Sons plc, Re [1995] 1 BCLC 14, CA (refd)
Shum Yip Properties Development Pty Ltd v Chats wood Investment and Development Company Pty and Others (2002) 40 ACSR 619 (refd)
Tien Ik Enterprises & Ors v Woodsville Sdn Bhd [1995] 1 MLJ 769, SC (refd)
Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661, CA (refd)

Legislation referred to

Companies Act 1965 ss 181,218(1)(f)
Companies Act 2006 [UK] s 994

Collin Pereira (Goh Wong Pereira) for the petioners.
Cedric Miranda (Cedric Miranda & Co) for the respondents.
YK Leong for the interim receiver.

Mohamad Ariff J:

[1] There were two petitions filed in this court with respect to the same subject matter — under s 181 and s 218(1)(f) of the Companies Act (D-26NCC-1 of 2010 and D-28NCC-31 of 2010 respectively). The relief claimed as far as s 218 was concerned was for an order to wind up the company named Ozone Glass Design Sdn Bhd ('Ozone'), which was the first respondent in D-26NCC-1 of 2010. In relation to the s 181 claim, the prayers were much broader in keeping with the wording of the section, namely for the following:

(i) Damages and losses suffered including loss of profit that will be suffered by your Petitioners arising from or as a consequence of the conduct [of the 2nd and 3rd Respondents] set forth above and that the Respondents pay and indemnify your Petitioners for damages and losses are assessed;

(ii) All due accounts and enquiries to be taken to ascertain the sum due and owing to your Petitioners;

(iii) That the 2nd and/or 3rd Respondents be ordered to purchase your Petitioners shareholding in the 1st Respondent at a fair price, to be assessed;

(iv) Interest on any monetary judgment at the rate of 8% per annum from the date of this Petition until full settlement;

(v) Costs;

(vi) That parties be at liberty to apply; and

(vii) Such further and/or other relief as this honourable court deems fit.

[2] The reference to 'conduct set forth above' refers to the alleged conduct, in particular of the second and third respondents, that was regarded as oppressive and/or in disregard of and/or unfairly discriminated against the petitioners and/or was allegedly otherwise prejudicial to the petitioners' interests as members of Ozone. It was also alleged that the affairs of Ozone and the powers of the directors had been conducted in a manner likely to defeat the legitimate expectations of its shareholders. Further, it is alleged that all the powers of the directors, namely the second and third respondents, were vested in these respondents as fiduciaries and the powers and management had not been exercised bona fide in the interest of the first respondent as a whole to achieve a proper purpose, but instead the powers had been used for collateral purposes.

THE STATUTORY PROVISIONS

[3] These broad grounds essentially repeated the statutory formula in s 181, reading:

> 181(1) Remedy in cases of an Oppression
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> Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the court for an order under the section on the ground —
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> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
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> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of other members or holders of debentures (including himself).
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> 181(2) Court Orders
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> If on such application the court is of the opinion that either of those grounds is established the court may, with a view of bringing into an end or remedying the matters complained of make such order as it thinks fit without prejudice to the generality of the foregoing the order may —
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> (a) direct or prohibit any act or cancel or vary any transaction or resolution;
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> (b) regulate the conduct of the affairs of the company in future;
>
> (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of the purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up."

THE UNDERLYING BASIS OF THE CLAIM, THE RELEVANT LAW AND ITS RATIONALE

[4] As can be seen from the prayers of the petitioners I have outlined above, juxtaposed against the statutory provisions, the petitioners' claim can be distilled and analysed as follows:

(a) the affairs of Ozone had been conducted, and the powers of the directors (Ted Chan and Eliza Suen) had been exercised, in a manner which was 'oppressive' to the petitioners;

(b) the affairs of Ozone had similarly been conducted and the powers of the directors had similarly been exercised 'in disregard' of the petitioners' interests as members /shareholders of Ozone;

(c) that acts of Ozone or resolution of the shareholders had been passed or proposed which 'unfairly discriminated' against the petitioners; and

(d) that these acts of Ozone or resolutions of the shareholders had been passed or proposed which were 'otherwise prejudicial' to the petitioners as members/shareholders of Ozone.

[5] The statutory terms of 'oppression', 'disregard', 'unfair discrimination' and 'prejudice' have acquired through the cases specialised meanings under s 181 of the Act, but it is possible to encapsulate the underlying philosophy as being grounded on a breach of an equitable bargain between the shareholders. What the breach is, and what that equitable bargain is, must of course depend on the precise circumstances of the case, and the precise nature of the company.

[6] The principles stated in the leading case of *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 have been consistently applied by the Malaysian courts, almost to the extent of being the starting point for any consideration of a s 181 petition. The Supreme Court in *Tien Ik Enterprises & Ors v Woodsville Sdn Bhd* [1995] 1 MLJ 769 interpreted the *Ebrahimi* principles as meaning simply the importation of equitable principles to govern the relationship amongst shareholders, which principles should be broadly read. See also *Owen Sim Lian Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113, *Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung, Re* [1978] 2 MLJ 227 and *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661. In *Kong Thai Sawmill* it was held:

> … for the case to be brought within s 181(1)(a) at all, the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon the power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interest in companies limited by shares have accepted majority rule. It is only when majority rule passes over into a rule oppressive of the minority, or in disregard of their interests, that section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made …

[7] Briefly stated, these cases demonstrate the influence of equity in company law matters. It is useful in this connection to quote the Lord Hoffmann in the more recent leading authority of *O'Neill and another v Phillips and others, Re a company (No 00709 0f 1992)* [1999] 2 BCLC 1:

> First, the company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity … as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.
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> The first of these two features leads to the conclusion that a member of the company will not ordinarily be entitled to complain of offenders unless there has been a breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair to those conducting the affairs of the company to rely upon the strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith. any

[8] See also the more recent cases of *Re Baumbler (UK) Ltd; Gerrard v Koby* [2005] 1 BCLC 92, *Re Guidezone Ltd* [2000] 2 BCLC 321 and *Grace v Biagioli, Titanium Electoral Products Ltd, Re* [2006] BCC 85, which have applied the principles in *O'Neill v Philips.*In *Grace v Biagioli*, the English Court of Appeal succinctly analysed the governing principles thus:

> From Lord Hoffmann speech …. one can deduce the following principles:
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> (a) The concept of unfairness, …. is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of

the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable;

(b) it follows that it will not ordinarily be unfair for the affairs of the company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, 'consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith' … the conduct need not therefore be unlawful, but it must be inequitable;

(c) although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles will render it unjust for a party to insist on the strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness;

(d) to be unfair, the conduct complained of need not be such as would have justified the making of a winding up order on just and equitable grounds …;

(e) a useful test is always to ask whether the exercise of the power or rights in question would involve a breach of an agreement or understanding between the parties which it would be unfair to allow a member to ignore. Such agreements do not have to be contractually binding in order to found the equity; and

(f) it is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is, however, different is that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder.

[9] *O'Neill v Philips* has also been followed by our own Federal Court in *Pan-Pacific Construction Holdings Sdn Bhd v Ngui-Kee Corporation (M) & Anor* [2010] 6 CLJ 721, where the Federal Court held:

… section 181 permits judicial remedy for categories of conduct, namely, oppressive conduct, conduct in disregard of interest, unfairly discriminatory conduct or prejudicial conduct.

It may also be noted that from the wordings of s 181 its basic theme is 'unfairness'. However, unfairness 'does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. … (see *O'Neill v Phillips* …)

> … in a winding up petition on the 'just and equitable' rule it was held that there must be 'a justifiable lack of confidence in the conduct and management of the company's affairs'. And such lack of confidence 'must be grounded on conduct of the directors, not in regard to private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or what is called a domestic policy of the company …
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> And it is to be noted that *O'Neill v Phillips* … held inferential that the principles governing winding up on the just and equitable basis applied equally in the context of the unfair prejudice remedy.
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> On the issue of breakdown of trust and confidence between parties in a quasi-partnership company, Lord Hoffmann in *O'Neill v Phillips* … said that there is no 'support in the authorities for such a stark right of unilateral withdrawal' when he rejected the contention that due to the breakdown of trust and confidence between the parties there ought to be a parting of ways and it would be unfair to leave the party locked into the company as a minority shareholder.
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> The House of Lords implied that the mere fact of breakdown in the relationship in terms of trust and confidence was not in itself sufficient to justify the grant of relief under s 459 on the basis of traditional equitable principles. Thus, the falling apart of the parties in a quasi-partnership company does not mean that the majority should be assumed to have broken any material agreements or understandings which are unenforceable in equity or assumed to have behaved in such a way as equity would regard as in bad faith (see also *Re Five-Minute Car Wash Services Ltd* [1966] 1 WLR 745 …) (see pp 735, 737 and 738 of the report).

[10] The above passage from the Federal Court judgment has endorsed three important principles, namely:

(a) The basic theme of an 'oppression' remedy is 'unfairness', which is to be assessed by the court judicially and on rational principles.

(b) Similar principles apply in a 'unfair prejudice' remedy and a winding up remedy on a just and equitable basis.

(c) There is no 'stark right of unilateral withdrawal' where there is a mere breakdown in the relationship of trust and confidence between the shareholders.

[11] The equitable basis of the courts' jurisdiction and the breach of an equitable bargain as a possible foundation for this jurisdiction, has received an extensive and authoritative commentary in a recent work by Robin Hollington QC in *Shareholders' Rights* ((6th Ed), 2010), which deals in the main with the new s 994 of English Companies Act 2006, but in my view the principles discussed are of general application and would apply even in the

context of s 181 of the Malaysian Companies Act. The learned author has this to say on English equivalent of the 'Unfair Prejudice Remedy':

(1) To establish a claim under section 994, the aggrieved shareholder must demonstrate that (a) the affairs of the company in question have been conducted (b) in a manner which is unfairly (c) prejudicial to the interests of the petitioner or the shareholders generally.

(2) Both elements (b), ie unfairness, and element (c), ie prejudice, have to be established. Conduct may be unfair without being prejudicial, and vice versa.

(3) As to (b), ie the requirement of unfairness:

(i) It is not enough that the conduct may be considered unfair applying subjective notions of commercial or other morality. In general, unfairness is to be determined by reference to equitable principles, which are themselves derived from the law of partnership. It does not follow, however, that relief may only be granted under the unfair prejudice remedy in the case of a company based on the relationship of akin to partnership.

(ii) The starting point is whether the parties had departed from what they have agreed among themselves, the 'bargain between shareholders'), ie a breach of what the shareholders have agreed in the articles of association and any collateral agreement between them.

(iii) Generally speaking, it is not open to the court to grant relief in respect of incomplete agreements between shareholders, but exceptionally, and particularly where the relationship between the shareholders is akin to a partnership, the bargain between shareholders will extend to non-contractual promises or understandings.

(iv) For this purpose the bargain between shareholders includes the performance by the directors of their duties owed to the company; in other words, a breach of such duties may found the claim in unfair prejudice. For this purpose the availability, or lack of availability, of a derivative claim in respect of the breach of duty is a relevant consideration in determining both whether the Petitioner is entitled to a remedy on the unfair prejudice ground and the nature of the remedy.

(v) Unfairness is also be established on the same grounds is justified relief under the parallel jurisdiction a winding up on the just and equitable basis … However, the two statutory remedies for the protection of minority shareholders (ie unfair prejudice and winding up) are merely parallel remedies and need to be considered independently. Grounds for relief under one remedy is not necessarily either a necessary or a sufficient condition for relief under the other.

(4) The breakdown of a relationship of trust and confidence between shareholders cannot of itself amount to unfair prejudice.

(5) The court has the widest discretion with regard to the relief to be granted if unfair prejudice is made out and will fashion the remedy of the unfair prejudice which has been made. (At pp 169 to 170 of the commentary)

[12] It is necessary to stress principle number (four) above. The test is not per se a breakdown of relationship of trust and confidence between the shareholders. There has to be something more to support a breach of the equitable bargain. And further, it is not sufficient for the petitioners to prove 'unfairness' on the part of the directors; they must proceed further to establish either unfair *discrimination* or unfair *prejudice*.

[13] I believe it is important to stress that the authorities, both case law and commentary, approach the applicable principles on broad grounds, and in this regard the actual decisions of the cases are merely instances of these grounds, and therefore should not be taken as final governing principles per se. Much will depend on the precise circumstances of the case.

I now turn to look at the basic facts of this dispute.

THE BACKGROUND FACTS

[14] Despite the intense acrimony between the parties, and the voluminous evidence presented in the affidavits and the limited cross-examination of the deponents Ted Chan ('first respondent'), Hj Su'ut ('second petitioner') and Dato' Hj Bujang ('shareholder of the first respondent'), the underlying facts can be briefly summarised. Ted Chan and his wife Eliza Suen are presently Australian citizens. Ted Chan was born in Kuala Lumpur. Sometime in 1994, he set up Ozone, according to him 'to set up in my home country Malaysia bringing into Malaysia the transfer of technology which I had acquired in Australia and Hong Kong'. Ozone, the company, deals with architectural glass, or structured glass, which is a highly specialised industry.

[15] Ted Chan and wife then rented a house belonging to Dato' Hj Bujang. The latter became interested in Ted Chan's glass business, especially his plan to acquire an interest in Malaysian Sheet Glass Plant in Sungai Buloh. Dato' Hj Bujang, who was then a used car businessman dealing with approved permits, indicated his interest to purchase a stake in Ozone, which he did sometime in October 2003, together with his friend, Hj Su'ut, who was at the material time a retired civil servant. Hj Bujang acquired 20% of the shares through his company, Mega Education Systems Sdn Bhd, while Hj Su'ut directly acquired in his name 17.4%, respectively paying RM2,000,000 and RM1,740,000. Ted Chan remained the majority shareholder with 62.6%. Both became directors of Ozone. Hj Bujang was appointed chairman of the company, and Hj Su'ut acted as Group Director, Finance and Adminstration.

[16] Hj Su'ut and Hj Bujang resigned as directors of the company on 27 October 2003. On the same day the company appointed Dato' Abdul Aziz Sheikh Fadzir as director.

[17] It is common ground that prior to 2003 Ozone had been making profits. In 2001 it made a profit of RM70,164 and in 2002 the profit was RM1,195,766. After the two petitioners became shareholders, the company started making losses, except for 2008. The losses were made on the back of higher revenues generally.

THE PETITIONERS' ARGUMENTS

[18] The petitioners took issue on these 'chronic' losses. The accounts, it was argued, disclosed huge sums been incurred purportedly in respect of 'cost of sales', 'administrative expenses' and 'other operating expenses'. The total amount incurred in respect of these items between 2003 and 2008 disclosed the following:

(i) Cost of sales	RM 14,945,735
(ii) Administrative expenses	RM 4,112,973
(iii) Other operating expenses	RM 2,559,289

[19] In this regard, the petitioners alleged that it was 'impossible' for Ozone to have made such huge losses with such high turnover. The petitioners claimed there had been an expropriation of funds and undisclosed benefits received by Ted Chan and his wife. In support of the claim in question, the petitioners also claimed that there had been a lack of transparency in the manner that Ted Chan and his wife had managed the affairs of Ozone.

[20] The essence of the petitioners' case can be found summarised in counsel's submission, reading:

> The Respondents, in the affidavit did not particularise what these expenses comprised of. In his oral testimony, the second Respondent merely stated what 'costs of sales' comprised of but never produce any documents to substantiate his testimony. Neither did the Respondents make available the management accounts available for inspection pursuant to the discovery process … Moreover, there has been no explanation, whether oral or by way of affidavit, as to what 'administrative expenses' or 'other operating expenses' comprised of.
>
> However, there is evidence that the 2nd and/or 3rd Respondents have been expropriating company funds for their personal expenses. In a report by IBDC, which were independent accountants, it was stated that:
>
> We have reviewed these expenses for the years 2002 to 2007 and noted that the yearly claims ranged from RM 200,000 to RM 350,000.
>
> The directors explained that they are entitled to the above benefits as they do not draw any salaries from Ozone. However, we have yet to receive a copy of such agreement from the director.

A What is even more pertinent to note is the expenses were paid for using company funds, which included the 2nd Respondent sons' school fees, credit card payments, condominium rental and maid's deposit.

B **[21]** It was argued without any proper management accounts being disclosed it was impossible to ascertain the full extent of the benefits received by the second and third respondents. The charging of personal expenses to the company and concealing the same from the other shareholders, it was argued, amounted to conduct which was oppressive and in disregard of the interests of
C the other shareholders. In this connection, counsel for the respondents cited as authority *Re Elgindata Ltd* [1991] BCLC 959 and *Shum Yip Properties Development Ptg Ltd v Chats wood Investment and Development Company Pty and Others* (2002) 40 ACSR 619.

D THE RESPONDENTS' ARGUMENTS

[22] The respondents denied the allegation of lack of transparency, and Ted Chan in his evidence laid emphasis on how there had been complete
E transparency in the company's dealings at all material times. This is particularly so between the years 2002 to 2003 when both Dato' Hj Bujang and Hj Su'ut were actively involved in Ozone, since they were both directors. Both of them were even made 'Group B signatories' to operate the company's account. Both chose to exit from the board when it became clear that the company's proposal
F to buy into Malaysian Sheet Glass did not materialise. It was when the purchase could not go through that both began to display a lack of interest in Ozone and then resigned from the board, and in the case of Dato' Hj Bujang, resigned as chairman of the company. At that time both of them indicated their wish to withdraw as directors, but recommended Dato' Abdul Aziz as a replacement.
G Even after their resignation from the board, they had been granted access to the documents of the company in the period between 2003 to 2008, during which the petitioners were attempting to sell their shares to third parties. The due diligence was done by the petitioners' solicitors for this purpose. Ted Chan in his affidavit also stressed that he did not promise the two petitioners any fixed returns and dividends on the shareholdings, and in fact he himself, although a
H majority shareholder, did not pay himself any such returns on dividends as well. Ted Chan argued he had injected about RM10,000,000 into Ozone after selling his landed properties in Australia and Hong Kong, to start the business in Malaysia. The high capital investment was necessary to purchase the expensive equipment such as furnaces and kilns from Italy and other parts of
I Europe. In his affidavit in reply, Ted Chan had the following to say:

> I wish to inform this honourable court that I had injected some RM 10,000,000 into Ozone Glass Design Sdn Bhd after selling my landed properties in Australia and Hong Kong. That is why Dato' Haji Bujang offered to pay RM2,000,000 for a

20% shareholding interest in the company. There was no Share Purchase Agreement drawn up wherein I promised Dato' Haji Bujang and Haji Su'ut bin Suhaili a fixed return for the investments.

Both of them understood that the company was still in its developing stages in Malaysia and we needed to purchase the expensive equipment such as furnaces and kilns from Italy and other parts of Europe to be able to undertake glass design projects which is marketing the company for.

I further aver that Haji Su'ut bin Suhaili himself occupied my room in Ozone Glass Design Sdn Bhd Rawang and he had a table next to me. He wrote many letters requesting for further financing on behalf of the company. In some of his letters he had expressed an in-depth understanding of the challenges facing the company and why the company did not show a large profit margin at the point time …

The situation then is the same as the situation now. Haji Su'ut bin Suhaili himself understood that the company had invested heavily in equipment and had to purchase high quality reflective glass and then offer itself for various large projects. I note from the affidavit that after Dato' Haji Bujang and Haji Su bin Suhaili left company in 2003 they made allegations that the company administrative expense and operating expense are inordinately large. The situation as Haji Su'ut bin Suhaili explained himself to Southern Bank Berhad as a situation the company is facing today is not different with specific regard to the operating expenses of the company and the need to purchase expensive raw materials. I wish to inform the court that the two items of expenses complained of in the affidavit are not inordinately large for a company of our size. Detailed profit and loss accounts for the years complained of have been available for inspection to the Petitioners. Throughout the years the Petitioners have appointed several other independent parties through their respective solicitors and accountants to conduct a thorough audit into the company accounts to ascertain if there were any discrepancies in our accounts. We extended our full cooperation to these independent scrutineers. To the best of my knowledge no discrepancies have been found as no irregularities have been reported back to the company.

I wish to state that the company has fully cooperated by providing the company's profit and loss account and the balance sheet to the people appointed by the Petitioners to look into the company.

I now exhibit minutes of the directors meetings which show that the Petitioners and/or the executives were present and were aware of the difficulties and challenges facing the company. It is quite extraordinary for the Petitioners now to claim that they were not involved in management power, that they did not have a say in management policy, that there is lack of transparency, that they have no access to full records of the company and that Eliza Suen and I are likely to be obstructive to them having access to the documents …

The Petitioners graciously exited from the company on 27/10/2003 and I had to keep the company afloat single-handedly with Eliza's help. We secured projects to supply tinted glass with large companies such as Bina Puri Sdn Bhd, True Fitness, the Gardens, Hartaya Intan and Mont Kiara. I have been financing the company myself in order to ensure there is sufficient working capital to purchase raw materials for these projects. More aggressive marketing is needed.

As Chairman of Ozone Glass Design Sdn Bhd I will continue to support the company and market the company during this challenging time.

There have been allegations of Eliza and me draining the company. I will say under oath that I have not been taking my own salary from the company as director as there were more pressing needs within the company. The company car given to me was a modest Proton Perdana V6 later replaced by a Nissan X-Trail.

I verily state that there has been no oppression conducted on the company. Indeed there is no oppression or discrimination exhibited in this receivership application. There is not an instance where I have failed to act in the best interests of the company. Indeed it is the Petitioners were suddenly left on 27/10/2003 leaving us in the replacement of one Dato' Abdul Aziz who only gave us additional problems.

EVALUATION OF THE EVIDENCE

[23] As can be seen in the arguments and the counterarguments, there was little common ground if one proceeds on the basis of the affidavit evidence merely. I therefore allowed the deponents to be cross-examined.

[24] After considering the totality of the evidence, both affidavit evidence and testimony of the deponents, I was not satisfied the petitioners had made out a case based on either s 181 or s 218 of the Companies Act. Further, I came to the opinion that it would be wrong and improper to order that Ozone be wound up on the evidence presented before this court. In delivering the decision of this court, I provided my oral grounds based on an evaluation of the evidence. I reproduce and incorporate the same here:

I will refer to and decide Suit No D-26NCC-1 of 2010 first. I have given detailed consideration to the Petition and the averments therein. It is very obvious that there are three main heads of complaint. The first relates to expropriation of profits. The second relates to lack of transparency and self interest, and the third involves the use of management powers of the first respondent. This third ground has to do with lack of transparency as well. All the headings under s 181 are raised. There are only four areas under 181 in this connection: oppression, disregard of interest, unfair discrimination and unfair prejudice. I will now summarise the headings. The core I find is the allegation vis-a-vis oppression or oppressive conduct. But each one heading runs into another in terms of categories. I have looked at the affidavits in support of the claim and the affidavits in reply, and I have considered the testimony of the witness called by both parties. I am not satisfied on the law and on the evidence that this is a proper case for this court to make any order under s 181. I now provide my reasons. I proceed first with the law for purpose of clarity. The case authorities specify that there must be not merely some departure from standard of dealings; there must be a visible departure from standards of fair dealing and violation of conditions of fair play. In short the petitioners have to establish very clearly that there has been a commercially unfair conduct. The core consideration must be one of equity. I do not find the equitable considerations in favour of the Petitioners. In fact I must say this. I find that the second petitioner, Hj Su'ud bin

Suhaili, has in fact come to court with slightly tainted hands. The evidence has been adduced to show that he himself benefited from the company. I need only mention at the moment the very expensive trip to London for him and his wife, which was paid for by the company. And yet he comes to court under s 181 complaining of the alleged oppressive conduct and unfair commercial conduct in disregard of interest. I do not think that is proper. As I said earlier, I have considered the evidence and I have tested it against the contemporaneous documents. Having done so, I cannot find sufficient persuasive evidence to allow the petitioners' claim. I have considered and fully tested Ted Chan's testimony. I find his testimony more probable and rather nearer to the truth. I have taken the evidence introduced by the petitioners themselves in this process of evaluating and testing the evidence. I am here looking in particular at the report produced during the hearing, namely the IBDC report (report on preliminary review of Ozone Glass Design Sdn Bhd and its subsidiary, dated 31 May 2008). Numerous citations were taken from this report in the course of the hearing. During the course of the hearing, only those parts favourable to the petitioners were highlighted. I have presently considered it in totality, and I find somewhat surprisingly that this report, instead of supporting the petitioners' case, in fact supports the respondent's case, particularly Ted Chan's testimony. To take an example, the section on 'Balance Sheet Item', para 2.1, in particular 2.1.1 under 'Property Plant Equipment (PPE)'. Whatever was stated by Mr Ted Chan in testimony was borne out by this report. The revaluation, the transfer into revaluation reserve account, the effect on depreciation charges, and the effect on the bottom line is mentioned in this section of the report. This is what the report says:

> This exercise has significant impact on the profitability of Ozone as the revalued figure would inflate the annual depreciation charge by about RM250,000(RM6,198,190 over 25 years). This effect would be further highlighted in item 2.2.1.
>
> On the other hand the issuance of bonus shares mentioned above has a very significant effect on the proportion of shareholding of the existing shareholders …

Turning now to the section on 'Sales, Cost of Sales and Expenses', I find Ted Chan's explanation given in his testimony being borne out. The evidence reflects what was given in testimony. The complaint by the petitioners was that there were no itemized particulars given to account for the high costs of sales. But if one looks at this report under para 2.2 the itemised particulars are provided from the years 2004 to 2007. I am referring here to the table under 'Consolidated Accounts'. If one looks under 'Sales' and under 'Gross Loss', and adding back 'Depreciation on revalued P & M' and 'Non-cash items Depreciation on actual PPE', the 'Gross loss' figure over 'contribution before depreciation' (Gross (loss) / contribution before depreciation) reflects whatever Mr Ted Chan was saying. Some time was spent in the course of the hearing on whether there were chronic losses such as to entitle the respondents to press ahead with their argument that it is best the company be wound up since there appears to be no real financial prospects for the company. Mr Ted Chan explained the losses could not be regarded as chronic losses because one had to take into account the depreciation element. This explanation is apparent in the report. Thus there is no ambiguity or surreptitious conduct on the part of the respondents, or the active non-disclosure of financial data. It is there from the petitioners' own evidence. There are other particulars on 'cost of sales' and 'expenses', and the itemisation on

expenses is also very detailed, right down to the payment of Astro bills. We have numerous items in detail, some major, some really minor and de minimis. As for the de minimis items, one can compare them with the bills incurred by Hj Su'ut. These concern the vouchers and the grocery bills paid by the company for his benefit. As such, for this petitioner to say that the expenses as disclosed in this report establish unfair conduct, unfair discrimination, or worst still oppression, are all not borne out by the evidence. I have taken note of course of the argument,and this is confirmed by the evidence, that whatever Mr Ted Chan has taken from the company is very much less than what he could have taken out by way of the drawing of his salaries under the employment agreement. As far as the employment contract is concerned, I am satisfied that it exists. There was an employment contract done by Messrs Prasad Abraham & Associates. What we do not have is the original, since Ted Chan has explained that it has been lost. An issue here can of course be posed on what the contents are, but the fact remains there was an agreement drawn out. One can only surmise if it was drawn up, then the copy that has been produced in court is in all probability the correct one. In any event this issue is akin to a storm in a tea cup because on the evidence as disclosed, Mr Ted Chan did not draw any salary. There were expenses but these expenses were not hidden. They were fully disclosed and even if they were hidden, they have been unearthed by this report. So I do not believe there is any unfair conduct or oppression in the sense of s 181. The other matter which I think must be highlighted because time has been spent on this inordinately, appears in para 2.3 as 'Amount owing to directors'. The issue here is whether Ted Chan actually lent money to the company or placed his own money in the company, for which the 9.3m ringgit is reflected as 'Amount Owing to Directors'. The petitioners have considered that this amount could only be an amount owing to Ted Chan or Ted Chan and wife, the two being the only existing directors. The petitioners further maintain there is no evidence to show Ted Chan actually expended the sum for the benefit of the company by way of loans. Again the report makes this very clear. Paragraph 2.3 of the report under the heading 'Amount Owing to Directors' states:

Based on our preliminary review of the records we have analysed the amount owing to Directors as shown in the accounts of OGD summary are as follows …

The report then refers to 'Bank receipts and transfers from Directors' for the amount of RM7,210,907.22, 'Loans made by Directors' amounting to RM603,038.30, 'Payment made by Directors for Group's expenses' for RM1,283,581.35, and 'Payment made by Directors for Group's purchase for land and building' for RM1,000,000. These items total up to RM10,097,526.87. When deductions are made against this total figure (being 'Less: Payments made on behalf of directors and Payments for purchase of director's car') and adjusted against 'Balance brought forward' as at January 2002, the balance carried forward shows a sum of RM9,300,006.41. This appears as the sum owing to the directors. Hence the petitioners' own auditors say:

We have test check some of the bank receipts and transfers to the Bank Statements and payments made by the Directors and they were found to be in order.

They added a caveat, however:

However without a special audit we were not able to establish the source of the monies and whether the money could have been transferred internally from the Ozone other bank accounts …

I feel it important to appreciate they did not say affirmatively Ted Chan did not lend the money. Even without the evidence which the witness wanted to volunteer to prove the point which was vigorously objected to, this report makes it very probable that Ted Chan as the majority shareholder had expended monies for the company. Thus, after considering this report, which is a primary evidence introduced by the Petitioners and not the respondents, and considering the totality of the evidence, there is no case to be made out for oppression or unfair commercial conduct. I am therefore dismissing this petition under s 181 with cost.

CONCLUSION

[25] As I have mentioned earlier, I have tested the affidavit evidence against the documents and the testimony of witnesses called. Although the payment of excessive remuneration to majority shareholders and directors in a situation where a company is operating at a loss, may at times be regarded as oppressive or unfairly prejudicial to the minority shareholders (as exemplified in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14), I was not satisfied that the facts of this particular dispute warranted such conclusion. Ted Chan, the second respondent, is the Managing Director of Ozone, and as such must be entitled to draw some payment for his efforts, and the evidence disclosed there was an employment contract between him and Ozone, which was most probably known or made known to Hj Su'ut, the second petitioner, at the very least. It came out very clearly through the evidence that Ted Chan was in fact drawing much less than what he was entitled to under the agreement. He has chosen not to draw his contractual salary, but instead has drawn disbursements to cover his and his wife's living expenses. What Ted Chan has drawn from the company to cover these expenses must be balanced against the capital and the loans that he has injected into Ozone. The petitioners had merely invested in the company in the situation where this investment was a pure commercial decision. This is not the case where one can impute a quasi-partnership relationship. Indeed, there is scant evidence to support such a finding. True enough Ozone is presently making losses, but the evidence presented showed these losses were incurred because the company had further invested in expensive machinery and moved its factory to a more expensive location and incurred higher rental and manpower costs, because of assurances made by another director (Dato' Aziz) that Ozone was in a position to obtain lucrative Putrajaya contracts. Dato' Aziz was brought into the company not by Ted Chan, but was recommended in part by Dato' Hj Bujang and Hj Su'ut themselves. The evidence also disclosed that the losses cannot really be regarded as 'chronic' losses. Ted Chan has stated on oath that he had been trying extremely hard, despite his ill health, to procure lucrative contracts for the company, which he

has in fact done. And he has been marketing the company in obtaining the contracts single-handedly with his wife without any help from the petitioners, who, it must be emphasised, voluntarily left the management of the company in the hands of Ted Chan and his wife when the petitioners resigned from the board. This, with respect, is not the case of involuntary exclusion from management. The evidence disclosed further the petitioners resigned from the board at a time when the proposed lucrative acquisition of Malaysian Sheet Glass did not materialise. When hard-nosed businessmen enter into an investment opportunity, they have to expect a risk of loss as well as an expectancy of profits. The court cannot be expected to provide an exit mechanism for them when an investment turns sour. As is sometimes said, the court cannot be expected to conduct a judicial review of business judgements. The jurisdiction conferred under ss 181 and 218 has to be exercised within their narrow compass against the precise evidence and circumstances presented before the court. Having evaluated the totality of the evidence, I found the case for the petitioners not substantiated. There was no breach of any equitable bargain, no commercial unfairness, no oppression, no unfair disregard of interests and generally no unfair prejudice being caused to the petitioners. I therefore dismissed the petitioners' suit in D-26NCC-1 of 2010 (the s 181 suit) with costs of RM30,000. In respect of suit D-28NCC-31 of 2010 (the s 218 suit), since the facts and the grounds in support were essentially similar, I also consequently dismissed this petition with no further order as to costs with a further order that the deposit be refunded to the petitioners, since my decision on the s 181 petition rendered the s 218(1)(f) suit redundant. I might add in passing that the petitioners could have very well instituted just one suit under s 181, and included the prayer for winding up of the company as an alternative ground. *O'Neill v Phillips* and *Pan-Pacific Construction Holdings Sdn Bhd v Ngui-Kee Corporation (M) & Anor*, have established that similar principles apply for both, and therefore it will be more conducive for speedy and effective disposal of a case for one action to be instituted, instead of unnecessarily clogging up the court list with two essentially similar actions involving the same parties.

Petitioners' suit dismissed with costs.

Reported by Ashgar Ali Ali Mohamed